IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI, *Petitioner*,

v.

DANIEL ACKERMAN, *Respondent*.

**On Writ of Certiorari to the Supreme Court of Pennsylvania**

## BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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### INTEREST OF NLADA AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

(2) NLADA, while recognizing that such position will expose its members to potential civil liability, joins petitioner in seeking reversal of the decision of the Pennsylvania Supreme Court holding the respondent, a court assigned private attorney, immune from a state malpractice action. NLADA has a keen interest in advancing the professionalism of public defenders and assigned private counsel, and the Association believes that this Court will be aided by the position of the only national group which speaks for public defenders.

(3) NLADA also has an interest in protecting the rights of our clients and in insuring that they are denied no rights on the basis of their wealth and submits this brief in support of our clients' equal access to the civil courts.

(4) The National Legal Aid and Defender Association has received the consent of both parties for the filing of this brief.

## ARGUMENT

### I. Federal Common Law Does Not Afford Immunity From Suit For Malpractice To Any Attorney Appointed To Represent An Indigent Defendant Under The Criminal Justice Act, Whether The Attorney Is Appointed From A Panel Or Bar Association Or Is A Member Of A Federal Public Defender Or Community Defender Organization.

In deciding the propriety of granting immunity from suit to particular government officials this Court has conducted "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Butz* v. *Economou,* 438 U.S. 478, 98 S.Ct. 2894, 2919 (1978). Accordingly, it has only extended the extraordinary protection of absolute immunity where such protection is both well established at common law and where the public interest clearly requires it. Neither our legal tradition nor the public interest in competent representation for indigent criminal defendants supports affording immunity to any attorney appointed under the Criminal Justice Act. Accordingly, this Court should conclude that all such counsel, whether selected from a panel or bar association or appointed by virtue of their position as members of a Federal Public Defender or Community Defender Organization, may be sued by these indigent clients for malpractice in the course of that representation.



#### A. Granting immunity from suit for malpractice to Federal Public Defenders, Community Defenders, or Panel Attorneys is contrary to our legal tradition and the content and history of the Criminal Justice Act.

There is no common law tradition of immunity for Criminal Justice Act attorneys which is even remotely comparable to that of prosecutors, judges, and grand jurors. Although such protection has been uniformly afforded those imbued with these public functions for centuries, the courts have divided over whether the relatively new role of *appointed* defense counsel, whether private attorney or public defender, warrants the same protection. Indeed, only one Court of Appeals has suggested that this sub-group of defense attorneys should be immunized, *Sullens* v. *Carroll,* 446 F.2d 1392 (5th Cir. 1971), while two others have implied the contrary, *Housand* v. *Heiman,* —— F.2d —— (2d Cir. March 29, 1979), slip op. 1827, 1832; *Robinson* v. *Bergstrom,* 579 F.2d 401, 411 (7th Cir. 1978), and one state supreme court has held that attorneys in its public

defender system are not so protected. *Spring* v. *Constantino*, 168 Conn. 563, 36 2A.2d 871 (1975).[1]

Moreover, there is no question but that Congress, in enacting the Criminal Justice Act and its amendments,

[1] Several Courts of Appeals have held that state public defenders are immune from actions under the Civil Rights Act. *Robinson* v. *Bergstrom, supra; Miller* v. *Barilla*, 549 F.2d 648 (9th Cir. 1977); *Minns* v. *Paul*, 542 F.2d 889 (4th Cir.), *cert. denied*, 429 U.S. 1102 (1977) [court-appointed private counsel]; *Brown* v. *Joseph*, 463 F.2d 1046 (3rd Cir.), *cert. denied*, 412 U.S. 950 (1973). To the extent that these decisions reflect a desire to equalize the treatment of appointed and retained counsel (as to whom there is no state action), *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049, they are very much in keeping with the basic values of our criminal justice system and the policy of the Criminal Justice Act. However, they are not explicitly applicable here. To the extent they reflect distinctions between § 1983 suits and malpractice claims, they are likewise irrelevant to the case at bar. *Robinson* v. *Bergstrom*, *supra*, 579 F.2d at 411 [holding public defenders immune under § 1983 but suggesting that the plaintiff would still "have the same state action in tort for malpractice against the public defender as a former client might have against a retained attorney."]; see also *O'Brien* v. *Colbath*, 465 F.2d 358 (5th Cir. 1972) [stating that § 1983 was never intended as a vehicle for prosecuting malpractice suits against court-appointed attorneys and public defenders]; *Fletcher* v. *Hook*, 446 F.2d 14 (3rd Cir. 1971) [tort claim against court-appointed counsel for malpractice not cognizable under the Civil Rights Act].

Finally, where these opinions purport to apply the test of *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), and *Butz* v. *Economou*, *supra*, they do so incorrectly, see *infra*. Neither § 1983 nor any considerations of public policy support the position that a state public defender acts under color of state law when performing his or her function as a defense attorney. Indeed, to so hold would reinforce the view, already responsible for much of the indigent defendant's cynicism towards the criminal justice system, that appointed lawyers are merely another part of the same "state" system which is trying to convict and imprison him. Compare *Slavin* v. *Curry*, 574 F.2d 1256 (5th Cir. 1978); *Espinoza* v. *Rogers*, 470 F.2d 1174 (10th Cir. 1972); and see also *Lefcourt* v. *Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971).



intended appointed attorneys performing their function to fall within the "tradition" of privately retained counsel, who are not immune from tort liability to their clients. In the first place, the 1970 amendment to the Act itself blurs the distinction between retained and appointed counsel by providing for court-ordered reimbursement where appropriate. 18 U.S.C. § 3006A. More importantly, the purpose of the Act was manifestly not to establish a functional distinction between attorneys representing defendants in the criminal justice system, but instead to achieve the goal of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) that the system would be just as adversarial for the poor as it has always been for the rich. At the same time, in all the discussions and reports on the 1980 amendments there is not the slightest inkling that Congress wanted attorneys appointed under any facet of the mixed system it created to be protected from their own incompetence.

The desire to equate the function of C.J.A. counsel with the private attorney is perhaps most evidenced by the expressions of *concern* that defender organizations would not be independent of the influence of the judiciary and the prosecution. This potential problem was addressed by Professor Dallin H. Oaks, who authored the study report on the legislation at the request of the Justice Department and the Judicial Conference Committee. He acknowledged the possible danger with defender offices but said that the *disadvantage* would be overcome by the mixed system approach, which would on the whole improve the quality of representation for indigents. Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. 91st Cong., 1st Sess., 289, 291-297, 301-303 (1969). Furthermore, the A.B.A. *Stand-*

*ards Relating to Providing Defense Services,* which were also considered in connection with the 1970 legislation, did not perceive any functional distinction between retained counsel, appointed counsel, or public defenders. To the contrary, the Standards emphasize the importance of guaranteeing the integrity of the attorney-client relationship regardless of which means of providing free defense counsel is selected and the concomitant necessity of assuring both the appearance and the reality of the appointed lawyer's independence from political and judicial interference. *Id.,* at 348, 351-352, 366-367.

**B. The public interest in providing the effective assistance of counsel to all criminal defendants requires that public defenders and other counsel appointed under the Criminal Justice Act, like their privately retained counterparts, not be immune from suit for malpractice.**

Where this Court has conferred absolute immunity it has done so based on a compelling public interest. Immunity has thus been granted judges, prosecutors and grand jurors because otherwise the exercise of their governmental functions would be severely impeded. The public interest behind the Criminal Justice Act, however, is not a governmental one but instead the need for effective representation for all criminal defendants as mandated by the Sixth Amendment. Since that interest is the same whether the defendant's attorney is retained or appointed it follows that just as immunizing hired counsel is seemingly unwarranted by the public interest, A.B.A. Code of Professional Responsibility, D.R. 6-102, so must be affording immunity to the appointed attorney. Moreover, that the arguments advanced for drawing a distinction between appointed and retained counsel on the question of



immunity in reality reflect at best acceptance of inferior (and therefore unconstitutional) representation for the indigent accused and at worst encouragement of such defective assistance of counsel.

The main contention advanced for immunizing public defenders and other appointed attorneys is that malpractice suits will interfere with counsels' "full exercise of professionalism, i.e., the unfettered discretion, in light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Minns* v. *Paul, supra,* 542 F.2d at 901. Manifest in this position are the views that the poor are more likely than the more wealthy to (1) pressure their attorneys into advancing frivolous claims and (2) sue their lawyers when they do not. There is no empirical data supporting either factual assertion, and the second is at least partially belied by the incidence of patently frivolous suits against *retained* counsel under the Civil Rights Act. See *Deas* v. *Potts,* 547 F.2d 800 (4th Cir. 1976); *Nelson* v. *Stratton,* 469 F.2d 1155 (5th Cir.) *cert. denied* 410 U.S. 957 (1973); *Steward* v. *Meeker,* 459 F.2d 669 (3rd Cir. 1972). Moreover, it is far more reasonable to attribute any frivolous claims by the poor to a lack of faith in defense counsel's stewardship, see *infra,* or to simple desperation (the most economically disadvantaged generally receive the harshest sentences) than to a callous disregard for judicial economy. Finally, this Court has repeatedly rejected the argument that the poor may be denied rights available to the rich on the elitist supposition that they have a greater tendency to abuse the judicial process. *Lindsey* v. *Normet,* 405 U.S. 56, 77

(1972); *Burns* v. *Ohio,* 360 U.S. 252, 257-258 (1959). It should respond in the same fashion here.

More implicit in the "professionalism" theory are some other disquieting assumptions which deserve comment. The first of these relates to the observation that all appointed counsel, and presumably public defenders in particular (since they represent indigent clients exclusively), would have inordinate difficulty resisting pressure to present meritless claims without immunity. This underestimates both the professional integrity of attorneys so employed and their devotion to advancing only those arguments which will legitimately advance the causes of their clients. While the public defender's task may at times be difficult, it will be performed to the same high standards with or without immunity.

The second suggestion is that court-appointed counsel are peculiarly required to assign priorities among their clients. Obviously, all attorneys must allocate their finite time and resources. This does not, however, justify that they be protected from tort actions for malpractice. The specific reference to this problem with respect to appointed attorneys thus implies that they are so burdened with work that they cannot adequately represent some clients without sacrificing the interests of others. This observation is certainly true in all too many instances. However, to advance it as support for denying compensatory relief to the victims of defective assistance of counsel is distressing to anyone concerned with the quality of representation for the indigent criminal defendant. Restricting the remedies for those injured by overworked and inadequately supported defender staffs is hardly an acceptable response to the problem. Indeed, the only acceptable response to this problem is for legislatures, and courts where necessary,



to insure that appointed counsel be given the resources necessary to provide effective assistance of counsel to the poor.

An even more insidious argument for immunity has been that leaving any appointed attorney open for suit will discourage competent attorneys from entering or remaining in this field. *Minns* v. *Paul, supra,* 542 F.2d at 901. This argument unfairly impugns the dedication and abilities of those lawyers who, in obedience to the commands of the Constitution and the standards of our profession, regularly defend the poor in criminal cases. Moreover, it shares with the first contention the vice of implicitly accepting unconstitutional inadequacies in our system for providing representation for the poor. At the same time, it even more clearly reveals the danger that such protection will encourage incompetence rather than more effective representation. To the extent there is a problem with attracting or retaining skilled attorneys to represent the poor, the rational solution is to provide higher salaries and better working conditions. After all, it could not seriously be contended that the absence of immunity discourages able attorneys from representing the rich. If there is a problem with tort liability, then the funding agency should secure malpractice insurance which is readily available to defender offices, and which, indeed, is already carried by many defenders through NLADA's group policy.

On the other hand, immunity is a most irrational means of stimulating the bar to defend the disadvantaged. To an attorney who is competent and devoted to such work and to his or her clients a grant of immunity from suit is of no moment. By definition he or she would not likely provide inadequate representation

and would not, in any event, desire to violate the Canons of Ethics by resisting a claim of malpractice by asserting immunity. Such protection would only attract to defender work that segment of the legal profession which would stand to benefit from it, the uncaring and the incompetent. Since this is the only effect of affording immunity to defenders of the poor, to do so would clearly violate the promise of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

While the analysis of the reasons advanced for immunity argues much more persuasively against than for it, that process does not exhaust the reasons why protection from tort claims is inconsistent with insuring the effective assistance of counsel. No attorney, civil or criminal, who makes his or her livelihood representing clients would minimize the value of securing the client's trust to successful performance. Without this critical bond it is impossible to lead even the most sophisticated client on the course which is most in his or her interest. The difficulties of establishing such trust are of course magnified when the client is unsophisticated and his or her freedom and reputation are at stake. Where the attorney is a public defender or, to a lesser extent, when the lawyer is court-appointed private counsel, the problem of gaining the client's trust is magnified due to the institutional position of government-funded counsel. As every public defender knows from experience and as every study of client relations has demonstrated, indigent defendants have a fundamental mistrust of such attorneys because they perceive them as having a primary allegiance to the state/prosecution. See Casper, *Improving Defender-Client Relations,* 34 NLADA Briefcase 114, 126 (1977); O'Brien, Peterson, Wright & Hostica, *The Criminal*



*Lawyer: The Defendant's Perspective,* 5 Am. J. Crim. L. 275, 292, 308 (1977); Booknote, 50 Denver L.J. 47, 83 (1973); Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Com on Constitutional Rights of the Senate Judiciary Comm. 91st Cong., 1st Sess., 305 (1969). The result of this perception and mistrust all too often is misguided self-help on the part of indigent clients and such disregarding of counsel's sound advice as to essentially lessen counsel's ability to provide effective representation. This crisis of confidence has adverse effects on the court system as well as on the client, since distrust of the "state defense lawyer" is also manifested in defendants' meritless appeals and collateral petitions.

The only way to eliminate this critical obstacle to providing skillful, constitutional representation to the economically disadvantaged is to move them as close as possible to the institutional position of private counsel, in whom indigent defendants have the greatest faith. It should be apparent that affording public defenders and court-appointed attorneys the same absolute immunity as prosecutors and judges, and thus distinguishing them even further from private counsel, would be a significant step in the wrong direction.

**II. Affording Immunity To Any Attorney Appointed Under The Criminal Justice Act, While Privately Retained Counsel Remain Subject To Suit For Malpractice, Would Violate Equal Protection As An Invidious Distinction Based On Wealth.**

A judicially created rule of law immunizing only counsel appointed under the Criminal Justice Act from suit for malpractice would clearly work a severe discrimination against the indigent criminal defendant without any compelling or even rational reason. Distinguishing between the poor and the rich in this regard

would contravene the constitutional mandate that the economically disadvantaged defendants in our country be placed on an equal footing at trial and on appeal with the more wealthy. Moreover, it is patently irrational, in light of the purpose of the Criminal Justice Act, to inflict the additional punishment of denying compensation where the C.J.A. representation falls short of minimum constitutional standards. Thus, to immunize such attorneys, where retained counsel remains amenable to suit, violates the Equal Protection provisions of the Fifth and Fourteenth Amendments to the Constitution.

This Court has repeatedly held unconstitutional procedures which deny indigents the same meaningful access to the courts to challenge their convictions as is enjoyed by their non-indigent peers. *Draper* v. *Washington,* 372 U.S. 487 (1963); *Lane* v. *Brown,* 372 U.S. 477 (1963); *Douglas* v. *California,* 372 U.S. 353 (1963); *Smith* v. *Bennett,* 365 U.S. 708 (1961); *Burns* v. *Ohio,* 360 U.S. 252 (1959); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); cf. *Ross* v. *Moffitt,* 417 U.S. 600 (1974). Although these decisions concern access in criminal proceedings, they are not materially distinguishable from the situation at Bar. This Court has already held that government may not discriminate against the indigent accused because the proceeding at issue, though related to the criminal trial, is purely civil in nature. *James* v. *Strange,* 407 U.S. 128 (1972). Besides, were immunity from malpractice suits granted the indigents' counsel while the wealthy remain free to sue, only the impoverished defendants would suffer by irremediable exclusion from the only available grievance-resolving mechanism, the courts. The discrimination here would thus be far more invidious than that which results from requiring notes of testimony or a filing fee.



Moreover, even if this case involved a civil plaintiff who was not also a criminal defendant seeking redress for a constitutionally defective conviction, the discrimination based on wealth would be intolerable. Reasonable access to the courts, where they are the only effective means of dispute resolution, is a fundamental part of our legal heritage. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). Total deprivation of a cause of action which is available to the wealthy is not reasonable access. It also does not present the kind of minimal financial burden, and thus minimal wealth discrimination, which this Court has upheld. See *Ortwein* v. *Schwab,* 410 U.S. 656 (1973); *United States* v. *Kras,* 409 U.S. 434 (1973).

Finally, evaluation of the conceivable justifications for specifically immunizing appointed counsel discloses no rational basis for this extreme step. As demonstrated in Argument I, *supra,* affording immunity to public defenders and appointed attorneys [2] would not improve the quality of legal representation for the poor. Moreover, even if it could be argued that such protection would in some cases have that salutary effect, it is not a rational means to the desired end. If the present system for providing free counsel is inadequate, the solution is to provide direct stimulus such as better training, necessary support services, and greater remuneration. It makes no sense to approach the problem in such indirect fashion, especially where the mechanism

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[2] Distinguishing between Federal Public Defenders, Community Defenders and other court-appointed counsel would certainly be irrational. The fact that a defendant is assigned to one rather than the other is fortuitous and there would be no justification for immunizing one type of attorney and not the others. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

adopted deprives those victimized by the deficiencies in the system of compensation for their injuries.

Neither can the discrimination proposed here be justified in terms of the need to prevent frivolous litigation in the criminal courts or in terms of insuring cost-sharing by the beneficiaries of the Criminal Justice Act. It is far too late in the jurisprudential day to argue that poor litigants should suffer discrimination in access to the courts because they are more frivolous litigious as a group than their wealthy peers. *Lindsey* v. *Norment, supra.* Finally, any possible assertion that immunity is an acceptable means of defraying the costs of appointing counsel is meritless. This allocation of the burden would be totally irrational since only those who received nothing, i.e., ineffective assistance, would pay.

Under these circumstances it can hardly be said that immunizing public defenders and court-appointed private lawyers would justify the cynicism and frustration with the criminal justice system which it would no doubt generate. See *Mayer* v. *City of Chicago,* 404 U.S. 189, 197-198 (1971).

### III. Absolute Immunity Should Not Be Afforded To Either Judges, Prosecutors Or Defense Counsel, Whether Appointed Or Retained.

The respondent's argument that counsel provided to an indigent accused must be absolutely immune because of the close analogy between their function and that of prosecutors and judges actually proves that absolute immunity for such officials is not required by the public interest. If private and appointed counsel can equally be expected to exercise sound discretion despite potential tort liability, as they can, then certainly judges and



prosecutors performing similar discretionary functions would not be significantly impeded in their duties by the possibility of suit for intentional wrongs. Hence, this Court should reconsider its prior decisions and eliminate entirely this extreme doctrine as applied to the judiciary and the prosecution.

Where it has afforded total protection from suit this Court has uniformly accepted the view that without immunity the threat of civil suit would severely hamper the exercise of the decision-making process which is necessary to effective government. *Imbler* v. *Pachtman,* 424 U.S. 409 (1976); *Pierson* v. *Ray,* 386 U.S. 547 (1967). This belief has in turn played a major part in influencing the positions the Court has taken. The traditional nature of reliance on the alleged danger from potential liability in these instances notwithstanding, the considerations and experience relevant to the issue at bar demonstrate that it has been misplaced. Clearly the possibility of suit has the effect of improving the representation of both retained and appointed counsel in criminal cases. A similar salutary benefit would result from making judges and prosecutors amenable to suit for intentional wrongs. Namely, it would provide a check on particular abuses of power which cannot realistically be reached through the electoral or impeachment processes. At the same time, it is apparent from society's acceptance of malpractice actions against attorneys that effective exercise of similar types of discretion by prosecutors and judges would not be significantly deterred by a much more limited exposure to potential liability.

This Court's expressed fear that litigation against these public officials would dangerously deflect their energies from public duties is also unwarranted in

modern circumstances. There can be no credible suggestion that attorneys representing clients are prevented from satisfying their responsibilities by suits against them. The same conclusion must follow for judges and prosecutors. Moreover, the practical requirement of counsel to prosecute a claim against a public official eliminates the danger that officials would be burdened with frivolous suits. The availability of malpractice insurance and the legal representation which goes with it also means that the cost of such litigation in terms of the official's time and concern would be minimal.

Finally, there would be at least one other major benefit from providing compensation for the victims of intentional misconduct by government. By providing the electorate with a meaningful remedy for misuse of the public trust this Court would in the long run increase faith in the public's chosen or appointed leadership and thus promote the legitimacy of our democracy. For this reason as well prosecutors and judges should no longer enjoy absolute immunity.



## CONCLUSION

For the reasons set forth herein, the National Legal Aid and Defender Association respectfully joins the Petitioner in urging this Court to reverse the mandate of the Pennsylvania Supreme Court and to remand this matter with directions to overrule the demurrer and to reinstate the complaint.

Respectfully submitted,

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